1627

SUPREME COURT OF THE UNITED STATES.

No. 117.

HENRY OELRICHS AND GUSTAV. W. LURMAN, PL'FFS IN ER.,

vs.

BENJAMIN FORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit in and for the Maryland district, begun and held at the city of Baltimore on the first Monday in November, in the year of our Lord one thousand eight hundred and fifty-seven—

Present, the honorable R. B. Taney, Chief Justice of the Supreme Court of the United States; William F. Giles, judge of Maryland district; William M. Addison, esquire, attorney; John W. Watkins, esquire, marshal; Thomas Spicer, clerk—Among other were the following proceedings, to wit:

BENJAMIN FORD
vs.
HENRY OELRICKS and
Gustav. W. Lurman.

Be it remembered that heretofore, to wit, on the twenty-first day of March, in the year of our Lord one thousand eight hundred and fifty-six, the said Benjamin Ford, by William George Brown and Frederick W. Brune, his attorneys, declared, in the circuit court here, against the said Henry Oelrichs and Gustav. W. Lurman, in a plea of trespass on the case, &c., in the words and of the tenor following, to wit:

Declaration.

MARYLAND DISTRICT, *to wit:*

In the circuit court of the United States for the fourth circuit, in and for the Maryland district, Henry Oelricks and Gustav. W. Lurman, trading under the firm of Oelricks & Lurman, late of Maryland district, citizens of the State of Maryland, were summoned to answer unto Benjamin Ford, of New York, a citizen of the State of New York, of a plea of trespass on the case, &c.; and thereupon the said Benjamin Ford, plaintiff in this action, by Brown & Brune, his attorneys, complains: For that whereas heretofore, to wit, by a certain agreement made the thirty-first day of October, in the year eighteen hundred and fifty-five, at the city of Baltimore, to wit, in the district aforesaid, between the said plaintiff, by John W. Bell, his agent, of the one part, and the said defendants, of the other part, and signed by said defendants by their said copartnership name, it is witnessed, that for and in consideration of the sum of one dollar, the receipt whereof is thereby acknowledged, they had that day purchased from John W. Bell, and agreed to receive from him, from the tenth to the twentieth days

of January thereafter, at his option, one thousand barrels of Ohio superfine flour, and one thousand barrels of Howard street superfine flour, they paying for the same at the rate of nine dollars per barrel on the day said flour should be ready for delivery, and in consideration thereof; and that the said plaintiff, at the special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to deliver the said flour to them, the said defendants, in the time and at the place aforesaid, they, the said defendants, undertook and then and there faithfully promised the said plaintiff to accept the said flour of and from the said plaintiff, and to pay him for the same on the delivery thereof to them, the said defendants, as aforesaid.

And although the said plaintiff, to wit, on the sixteenth day of January, eighteen hundred [and] fifty-six, at the city aforesaid, to wit, in the district aforesaid, was ready and willing, and then and there tendered and offered to deliver the said flour to them, the said defendants, and then and there requested the said defendants to accept the same, and to pay him for the same as aforesaid, yet the said defendants did not and would not, at the said time when they were so requested as aforesaid, or at any time before or afterwards, accept the said flour or any part thereof of and from him, the said plaintiff, or pay him for the same as aforesaid, but then and there wholly neglected and refused so to do. And whereas also heretofore, to wit, on the seventh day of Nov'r, in the year eighteen hundred and fifty-five, at the city of Baltimore aforesaid, to wit, at the district aforesaid, the said defendants did, by L. E. Ballard, broker, their agent, enter into a certain other contract with the plaintiff, by his agent, John W. Bell, which contract is signed by said Ballard and approved by the defendants, by and under their own signature of their said copartnership, and is as follows, to wit: For and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I have this day purchased from J. W. Bell, agent for Benjamin Ford, New York, for account of Oelricks & Lurman, Baltimore, ten thousand barrels superfine Howard street or Ohio flour, deliverable at seller's option in lots of five hundred barrels, each lot subject to three days' notice of delivery, and payable on delivery at the rate of nine dollars and twenty-five cents per barrel, namely, two thousand barrels, seller's option, all December, eighteen hundred and fifty-five; four thousand barrels, seller's option, all January, eighteen hundred and fifty-six; four thousand barrels, seller's option, all February, eighteen hundred and fifty-six. And in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to deliver the said flour to them, the said defendants, in the time and at the place aforesaid, they, the said defendants, undertook and then and there faithfully promised the said plaintiff to accept the said flour of and from him, the said

plaintiff, and to pay him for the same on the delivery thereof to them, the said defendants, as aforesaid.

And whereas the said plaintiff, to wit, on the *on the* sixteenth day of January, eighteen hundred and fifty-six, at the city aforesaid, to wit, in the district aforesaid, gave notice to the defendants that in pursuance of said contract he would deliver to them five hundred barrels of said flour on each of the following days, to wit, on Monday, the twenty-first day of January, on Tuesday, the twenty-second of January, on Wednesday, the twenty-third day of January, on Thursday, the twenty-fourth of January, on Friday, the twenty-fifth of January, on Saturday, the twenty-sixth of January, on Monday, the twenty-eighth of January, and on Tuesday, the twenty-ninth of January.

And whereas the said plaintiff, afterwards, to wit, on the fifteenth day of February, eighteen hundred and fifty-six, at the city aforesaid, to wit, at the district aforesaid, gave notice to the defendants, that in pursuance of said contract, he would deliver to them five hundred barrels of said flour, on each of the following days, to wit: on Tuesday, the nineteenth day of February, on Wednesday, the twentieth of February, on Thursday, the twenty-first of February, on Friday, the twenty-second of February, on Saturday, the twenty-third of February, on Monday, the twenty-fifth of February, on Tuesday, the twenty-sixth of February, on Wednesday, the twenty-seventh of February. And whereas, upon each of said days, respectively, at the city of Baltimore, to wit, at the district aforesaid, the said plaintiff was ready and willing, and then and there tendered and offered to deliver five hundred barrels of the said flour to the said defendants, and then and there requested the said defendants to accept the same, and to pay him for the same as aforesaid, yet the said defendants did not nor would at the said times when they were so requested as aforesaid, or any time before or afterwards accept the said flour, or any part thereof, of or from him, the said plaintiff, or pay him for the same as aforesaid, but then and there wholly neglected and refused so to do.

And whereas the defendants, afterwards, to wit, on the first day of March, in the year eighteen hundred and fifty-six, at the city aforesaid, to wit, at the district aforesaid, were indebted to the plaintiff in the sum of sixteen thousand dollars for goods bargained and sold by the plaintiff to the defendants at their request; and in a like sum of money for money by the plaintiff paid for the defendants at their request; and in a like sum of money for money found to be due from the defendants to the plaintiff on an account then and there stated between them; and in a like sum of money for money then and there received by the said defendants for the use of the plaintiff; and the defendants, afterwards, on the day and year last aforesaid, at the city aforesaid, in consideration of the premises respectively in this count mentioned, then and there promised to pay the said sums of money last above specified to the

plaintiff on request. Yet the said defendants have disregarded their promises, and have not paid any of the said several sums of money, or any part thereof, to the damage of the plaintiff in the sum of twenty-five thousand dollars; and thereupon he brings suit, &c.

BROWN & BRUNE,
Plt'ffs Atty's.

Which said declaration is thus endorsed, to wit:

Mr. SPICER: Docket this suit, by consent, to April term, 1856. Service of copy on defendants is admitted.

BROWN & BRUNE,
For Plt'ff.
WM. F. FRICK,
For Defend'ts.

And thereupon, on the first Monday in April, in the year of our Lord one thousand eight hundred and fifty-six, come into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord one thousand eight hundred and fifty-six, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid. And the said Henry Oelricks and Gustav. W. Lurman, by their attorneys aforesaid, pray the court here that the said Benjamin Ford may be ruled to give security for costs in the plea aforesaid.

Rule Security for Costs.

Whereupon comes here into court in his own proper person Philip R. Pendleton, of the said district, and undertakes for the said Benjamin Ford, that if the said Benjamin Ford, in the plea aforesaid, shall be non-suited, or from maintaining his action aforesaid shall be precluded, then the said Benjamin Ford shall pay unto the said Henry Oelricks and Gustave W. Lurman all such costs and charges by them about their defence in this part sustained which shall be adjudged unto the said Henry Oelricks and Gustave W. Lurman by the court here, or that he, the said Philip R. Pendleton, will do the same for him.

And the said Benjamin Ford offers himself, by his attorney aforesaid, ready for trial in the plea aforesaid; thereupon, the said Henry Oelricks and Gustavus W. Lurman, by their attorney aforesaid, suggest to the court here that they cannot safely proceed now here to the trial of this cause, because, &c.

Therefore it is considered by the court here, that the said Benjamin recover against the said Henry Oelricks and Gustav. W. Lurman the sum of $ for his costs and charges by him sustained about his suit in this behalf sustained since the last continuance of the plea aforesaid.

And thereupon, with the consent of the parties aforesaid, by their attorneys aforesaid, and by order of the court here, further process of and upon the premises aforesaid, between the parties aforesaid, is further continued until the first Monday in April next.

Afterwards, to wit, on the tenth day of January, in the year of our Lord one thousand eight hundred and fifty-seven, the parties aforesaid, by their attorneys aforesaid, filed in the circuit court here an agreement, in the words and of the tenor following, to wit:

Agreement.

IN CIRCUIT COURT U. S.

BENJAMIN FORD
vs.
OELRICKS & LURMAN.

It is agreed that the declaration in this case be amended by striking therefrom the count on a contract alleged therein to have been made, and of which the following is a copy:

"Baltimore, Oct. 31st, 1855. For and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, we have this day purchased from John W. Bell, and agreed to receive of him from the tenth to the twentieth days of January next, at his option, one thousand barrels Ohio superfine flour, and one thousand barrels Howard st. super. flour, we paying for the same at the rate of nine dollars per barrel, on the day said flour is ready for delivery."

(Signed) OELRICKS & LURMAN.

1,000 Ohio. } S. 6.
1,000 How st. } 10 and 20 Jan'y, '56. $9.

BROWN & BRUNE,
For Pl'tffs.
WM. F. FRICK,
For Defend'ts.

JAN'Y 9TH, '57.

At which said first Monday in April, in the year of our Lord one thousand eight hundred and fifty-seven, come again into the circuit court here the parties aforesaid, by attorneys aforesaid.

Thereupon, further process of and upon the premises aforesaid,

between the parties aforesaid, by order of the court here, is further continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord one thousand eight hundred and fifty-seven, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Plea and Issue.

And the said Henry Oelricks and Gustav. W. Lurman, by William F. Frick and John Nelson, their attorneys, come and defend the force and injury, when, and so forth, and say that they did not assume upon themselves in such manner and form as the said Benjamin Ford above against them hath complained; and of this they put themselves upon the country. And the said Benjamin Ford in like manner, and so forth.

Therefore, let a jury thereon appear before the court here, immediately, by whom, &c., and who neither, &c., to recognize, &c., because, as well, &c.

Whereupon, for trying the issue aforesaid, it is ordered by the court here, that twenty persons from the pannel of petit jurors returned to the court here by the marshal of the Maryland district aforesaid, be drawn by ballot; and thereupon, the twenty persons being so drawn by ballot, and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, thereupon the remaining twelve persons being called, come, to wit:

Jury.

Anthony Meltenberger, Joshua Jones, James McHenry, William H. Armitage, Joseph Heighe, Joseph C. Boothe, Sheppard C. Leakin, Gist T. Cockey, Jacob Beckley, Henry C. Neill, Arthur J. R. Magruder, Zacariah Busby, who, being empannelled and sworn to say the truth in the premises, upon their oath do say that the said Henry Oelricks and Gustav. W. Lurman did assume upon themselves in manner and form as the aforesaid Benjamin Ford within against them hath complained; and they assess the damages of the said Benjamin Ford, sustained by occasion of the non-performance of the promises and assumptions aforesaid, to the sum of twelve thousand one hundred and sixty-nine dollars current money.

Judgment.

Therefore it is considered by the court here, that the said Benjamin Ford recover against the said Henry Oelricks and Gustav. W. Lurman, as well the sum of twelve thousand one hundred and sixty-nine dollars current money, his damages aforesaid, by the jurors aforesaid, in form aforesaid, assessed to be sustained by occasion of the *non* non-performance of the promises and assumptions aforesaid, as the sum of sixty-eight dollars and fifty cents by the court here

unto him, the said Benjamin Ford, on his assent, adjudged for his costs and charges by him about his suit in this behalf laid out and expended.

And the said Henry Oelricks and Gustav. W. Lurman, in mercy, &c.

Memorandum.

Before the jurors aforesaid withdrew from the bar of the court here, the said Henry Oelricks and Gustav. W. Lurman, by their attorneys aforesaid, tendered to the court here the following bill of exceptions, which was by the court here signed and sealed, and which is in form following, to wit:

Defendants' Bill of Exceptions.

IN THE CIRCUIT COURT OF THE U. S.,
For the District of Maryland.

BENJAMIN FORD
vs.
HENRY OELRICKS and GUSTAV. W. LURMAN. } November term, 1857.

At the trial of this cause, the plaintiff, to support the issue on his part, offered in evidence a certain written contract of the following tenor, and proved the signatures thereto, and that the defendants were co-partners, under the firm of Oelricks and Lurman:

Contract.

BALTIMORE, *November 7th*, 1855.

For and in consideration of one dollar, the receipt whereof is hereby acknowledged, I have this day purchased from J. W. Bell, agent for Benjamin Ford, New York, for account of Oelricks & Lurman, Baltimore, ten thousand barrels superfine Howard street or Ohio flour, deliverable, at seller's option, in lots of five hundred barrels, each lot subject to three days' notice of delivery, and payable on delivery, at the rate of nine dollars and twenty-five cents per barrel, viz:

2,000 barrels,	seller's option,	all	.....	Dec'r, 1855.
4,000 "	"	"	.....	Jan'y, 1856.
4,000 "	"	"	.....	Feb'y, 1856.
10,000 bbls.				

L. E. BALLARD,
Broker.

Approved— OELKICKS & LURMAN.

And also the following correspondence, viz :

Letter from Benjamin Ford to Oelricks & Lurman, dated Baltimore, January 16, 1856.

BALTIMORE, *January* 16, 1856.

Messrs. OELRICKS & LURMAN :

GENTLEMEN : Referring you to my letter to you of this date, I now give you notice that on Monday, the 21st January inst., on Tuesday, the 22d inst., on Wednesday, the 23d inst., on Thursday, the 24th inst., on Friday, the 25th inst., on Saturday, the 26th inst., on Monday, the 28th inst., and on Tuesday, the 29th inst.— that is to say, on each of these days, respectively, I will deliver to you five hundred barrels of superfine Howard st. or Ohio flour, on your paying for the same on delivery, at the rate of nine dollars and twenty-five cents per barrel, in pursuance of the contract dated the 7th Nov., 1855, approved by you, under your own signature, and which was made by L. E. Ballard, for your account, with J. W. Bell as my agent. This contract has already been in part performed by the delivery of 2,000 barrels in December last. Enclosed you will find a copy of this contract. In reference to the contract of which I sent you a copy in my letter of this date, I am ready, if you desire it, to give you the most satisfactory proof that it was made for me, and that I am the principal therein.

Respectfully,

BENJ'N FORD.

Letter from Oelricks and Lurman to Brown & Brune, att'ys for Benj'n Ford, dated Baltimore, 16 *Jan'y,* 1856.

BALTIMORE, *Jan'y* 16, 1856.

Messrs. BROWN & BRUNE,
Att'ys for Benj'n Ford :

GENTLEMEN : In reply to Mr. Ford's second note of this date, handed us by you since the receipt of our answer to the first, we have only to say that you were notified on the 29th December last, that our agent, Mr. Ballard, had on the 21st of that month demanded from Mr. Bell, as the Baltimore agent of Mr. Ford in the transaction, a deposit of $5,000, as margin on the contract of Nov'r 7th, 1855, referred to in Mr. Ford's note, and that we should, according to mercantile usage, treat the contract as rescinded, by reason of the failure to comply with our reasonable demand for security.

We have been compelled, as before stated, to supply our wants elsewhere ; and must decline to receive the flour which Mr. Ford offers to deliver from the 21st to the 29th of this month, inclusive ; of which we desire him to take due notice.

OELRICKS & LURMAN,
By WM. F. FRICK, *their Att'y.*

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Letter from Benj'n Ford, by Brown & Brune, his att'ys, to Oelricks & Lurman, dated Baltimore, February 15th, 1856.

BALTIMORE, *February* 15, 1856.

Messrs. OELRICKS & LURMAN:

GENT'N: I hereby give you notice, that on Tuesday, the 19th inst., Wednesday, the 20th inst., Thursday, the 21st inst., Friday, the 22d inst., Saturday, the 23d inst., on Monday, the 25th inst., Tuesday, the 26th inst., and Wednesday, the 27th inst.—that is to say, on each of those days, respectively, I will deliver to you five hundred barrels of superfine Howard st. or Ohio flour, on your paying for the same on delivery, at the rate of nine dollars and twenty-five cents per barrel, in pursuance of the contract, dated November 7th, 1855, approved by you, and of which you have a copy.

Respectfully,

BENJ'N FORD,
By BROWN & BRUNE.

Letter from Wm. F. Frick, att'y for Oelricks & Lurman, to Brown & Brune, dated Baltimore, February 15, 1856.

BALTIMORE, *February* 15, 1856.

Messrs. BROWN & BRUNE:

GENT'N: Yours of this date, is just received, tendering to Messrs. Oelricks & Lurman a delivery of 4,000 barrels of flour between the 19th and 27th of this month. On behalf of Messrs. Oelricks & Lurman, I have only to reply that they decline to receive the flour; referring you for their reasons to their letter of Jan'y 16, 1856, in which they informed you that the contract of Nov'r 7, 1855, to which you refer, had been rescinded.

Respectfully,

WM. F. FRICK,
For OELRICKS & LURMAN.

Evidence of George W. Brown, esq., for plaintiff.

The plaintiff then proved, by George W. Brown, esq., of the firm of Brown & Brune, that as the attorney of the plaintiff, he called about 12 o'clock, on the 29th of December, 1855, with John H. Ford, son of the plaintiff, upon Wm. F. Frick, esquire, to whom he had been referred by the defendants, as their attorney; that he showed Mr. Frick two contracts, one dated Nov. 7th, 1855, signed by Ballard, broker, and approved by the defendants, and also another dated October 31st, 1855, signed by the defendants, and informed him that the latter contract, though not on its face on behalf of the plaintiff, was, by the books and papers of Mr. Bell, shown to be for him, and was in fact for him; and that Mr. Ford

was the owner of both, and would comply with both of said contracts; and they had called to give Mr. Frick notice of that.

That Mr. Frick replied that the plaintiff had been in town on Christmas; to which the witness answered, that he had been, and had gone out of town on Christmas night. That Mr. Frick then said that Mr. Levering had seen him on 'Change the following day; to which young Mr. Ford replied, that it was he who had been in town and on 'Change the day after Christmas, but that his father had left town on Christmas evening. That Mr. Frick then said that the plaintiff had not put up any money under the contract, to which the witness replied that he denied the right of the defendants to demand any, but that the plaintiff was prepared to do anything required by the contract. That Mr. Frick said the defendants did not know the plaintiff in the transaction, and considered the contract at an end.

Evidence of Stewart, Brown, and Wyatt, for plaintiff.

The plaintiff then further proved, by Messrs. Stewart, Brown, and Wyatt, that they were clerks of Messrs. Brown & Brune, the attorneys of the plaintiff, and that on each one of the days mentioned in the two letters of the plaintiff, of Jan'y 16th, and Feb'y 15th, already offered in evidence, they called, with Messrs. Meixsell & Grafton, flour merchants, or one of them, upon Mr. F. Frick, attorney for the defendants, to whom they had been referred by the defendants, and on each occasion that they had tendered to him, on behalf of the plaintiff, the delivery of five hundred barrels of superfine Howard st. or Ohio flour, to be paid for by the defendants, at the rate of nine dollars and twenty-five cents per barrel; and that their tender or offer was on every occasion declined.

Cross-examination.

On cross-examination said witnesses said they did not know whether there was any flour belonging to the plaintiff ready for delivery on any of the occasions referred to.

Evidence of Meixsell & Grafton for plaintiff.

The plaintiff then further proved, by Messrs. Meixsell & Grafton, that they were flour dealers in the city of Baltimore; that one or the other of them was present at the times of the different tenders of the flour spoken of by Messrs. Brown & Wyatt; and that they, the witnesses, had, on behalf of the plaintiff, on the occasion of each tender, 500 barrels of superfine Howard street or Ohio flour to be delivered to the defendants in case they had been willing to receive and pay for the same the contract price, and that they tendered the same to the defendants, and on each occasion they refused to receive it.

Cross-examination.

These witnesses, on cross-examination, stated that *that* the flour tendered did not belong to the plaintiff, and that they had no flour belonging to the plaintiff; but that they always had on hand from 3,000 to 5,000 barrels of that kind of flour. They stated that the plaintiff had made a bargain with them to procure a tender of their flour to the defendants on his behalf, agreeing to pay them a commission of twelve-and-a-half cents a barrel, in case the flour should be accepted and paid for by the defendants. And they further stated that the commission had been paid to them, although the flour was not accepted. They further proved that on the 21st January, 1856, such flour as they tendered was selling at $8 to $8.12, on the 22d at $8.25, on the 23d at $8.25 to $8.50, on the 24th, 25th, 26th, 28th, 29th, at $8.50. That on the 19th February such flour was selling at $7.50, on the 20th at $7, on the 21st and 22d at $7.25, on the 23d at $7, on the 25th at $6.50, and on the 26th and 27th at $6.75.

Evidence of Mr. Manro for plaintiff.

The plaintiff then proved by Mr. Manro, that he was a clerk of John W. Bell, who was a flour merchant in Baltimore city; that 2,000 barrels of flour, under the contract given in evidence, were delivered by Bell to the defendants in the month of December, 1856—1,000 on the 12th, and 1,000 on the 15th December—and that Bell received payment for them.

That on the 19th December, 1855, Bell was not at his place of business, and has never since been in Baltimore; that he believed him to be now in California; that at the time of his disappearance, no one knew what had become of him, and there were various rumors of his whereabouts. Some persons thought for some time that he was still in the city; others that he had run away, and others that he had been murdered.

Evidence of Mr. Newcomer for defendts.

The defendants then, to sustain the issue on their part, proved by Mr. Newcomer that he had been for fifteen years a flour merchant in the city of Baltimore, and had been accustomed to enter into contracts for the purchase and sale of flour, deliverable at a future time; that he recognized and had acted upon a custom in his business, under which either party to the contract might require a margin, to a reasonable amount, to be put up by both, to secure a performance of the same, and that the contract might, under such custom, be rescinded, in case the demand for a margin was not complied with. That he could not say that such was the general usage of the trade; that different persons have different customs; some consider that there is such an usage, and some do not.

That it was frequently his custom, in making time contracts, to

state to the other parties that he always held himself ready to put up a margin whenever demanded, and that he considered himself entitled to demand the same. That the occasions for exercising the right were rare in his business, as he always endeavored to make such contracts only with perfectly responsible parties. But that on two occasions, that he recollected, one in the case of James W. Osborne, and the other in the case of *of* Guest & Gilmor, he had, from apprehension of the solvency of the parties, made a demand for a margin, and cancelled the contracts on the failure to put it up. That at the time of making these contracts nothing was said about a margin, and no objection was made in either to the demand, or to the subsequent cancelling of the contracts. That Osborn and Guest & Gilmor were both Baltimore merchants.

Cross-examination.

On the cross-examination the witness stated that the case of J. W. Osborn occurred some years ago. He became insolvent, and on the demand for a margin the contract was cancelled, by consent; that Guest & Gilmor declined to put up a margin, because a New York house, for whom they were contracting, had failed to give them security. On the demand being made, their contract was cancelled, by consent. Guest & Gilmor had also not signed the contract made by the broker at the time it was cancelled. It is customary for the principal to confirm the contract of the broker by signing it.

Evidence of Mr. Walters for defend'ts.

They further proved, by Mr. Walters, that he had been for many years engaged in the flour business in the city of Baltimore. That he was accustomed to deal in that article on time. That he had at all times in his business considered it to be a right, which might be exercised by either party to a time contract, whenever he apprehended any risk, to call for a margin to be put up, to secure the performance of the contract, and to cancel the contract if the margin was not put up. That he considered such to be the usage for this reason: that repeatedly, both before and after making his time contracts, he had mentioned to the other parties that he should expect a margin to be put up whenever required, and he had never, in any instance, heard any objection made. That, as he always tried to make his bargains with responsible parties, the necessity of asking for a margin was very rare; but that on two occasions, one from a man by the name of Christ, of Pennsylvania, and another, from a man in the west, he had demanded a margin, and that, in the first, it was put up, and in the second, not being put up, he had rescinded the contract. That, although these parties did not live in Baltimore, yet their contracts were made here, and he therefore considered them subject to the Baltimore usage. That most of his

contracts for future delivery were in writing; that he had neve introduced any provision about putting up a margin in his contracts. He did not think it necessary to insert it.

Cross-examination.

On cross-examination this witness stated that as he understood the custom, the right to demand a margin arose whenever, during the running of the contract, either party apprehended any risk of its not being performed by the other. Being asked whether there was any right to ask for a margin from a party who was solvent, he replied, that he supposed not. Being further cross-examined, as to whether there was any standard by which the amount of the margin could be fixed, he replied, that the right was to demand a margin that was reasonable; and in case there was any dispute between the parties as to the reasonableness of the amount demanded, that difference must be settled, like other mercantile disputes, by the arbitrament of merchants of experience and judgment in the same business. That, from the nature of the thing, there could be no certain standard as so much a barrel; for that, according to the state of the market, and the time the contract had to run, a dollar a barrel might at one time be sufficient, and at another two dollars a barrel might not be enough. That what was reasonable was what was enough to make a man safe, according to the state of the market; and that no one would be acting according to the custom, if he asked what was unreasonable. That he considered the demand for a margin in this case to be for a reasonable amount.

On cross-examination, this witness being asked whether flour was not an article that fluctuated much in price, he said it did. Being asked whether it was possible to determine what would be the price of flour at the end of two or three months, he said it was not. Being further asked how merchants to whom the question was referred should determine the amount of margin to be put up, he replied, that they must decide what would be reasonable.

Evidence of Mr. Fowler for defend'ts.

They further proved, by Mr. Fowler, that he was a member of the firm of Fowler & Ziegler, who had been for many years flour merchants in Baltimore city. That he had been in the habit of making contracts for the time sale or purchase of flour. That in his business, he had always considered such contracts to be subject to a right of either party, whenever, either at the time of making the contract or subsequently, such party should become apprehensive of the good faith or responsibility of the other, to require a margin to be put up in a reasonable amount; and that, on failure to put up the margin demanded, the contract might be cancelled. That the occasions for exercising the right were rare; inasmuch as such contracts were only made by his house with perfectly responsible

parties—as far as they could judge at the time. That whenever his firm had had reason to avail themselves of the custom, as they understood it, that they had done so, and their course had never been objected to. That their firm had made a contract for future delivery of flour with Guest & Gilmor, of this city. The contract had been made by and with a broker, and noted in writing by him, although Guest & Gilmor had never signed any contract.

That the witness, being fearful about the solvency of Guest & Gilmor, had called upon them to put up a margin, and that they declining to do so, he had cancelled the contract. That in another instance, his firm had a contract for future delivery of flour with P. Malcolm & Co., of Baltimore, who, however, were agents of a New York firm in the transaction. That, becoming apprehensive about the latter, he had called on Malcolm & Co. for a margin, or that they should make themselves responsible for the contract, which being declined, the contract was rescinded.

In both these cases nothing had been said about a margin at the time of making the contracts. The margin that he had demanded was one dollar per barrel, which he thought reasonable, and which was not objected to; that there could be, in the nature of things, no fixed amount per barrel as the amount of margin to be demanded.

The right was to a margin to a reasonable amount; and that reasonableness could only be determined by the judgment of merchants in the same business. That he considered the margin demanded by the defendants in this case to be perfectly reasonable. That under the same circumstances, he would have required at least one dollar per barrel, that is to say, $8,000 margin; that his reasons for this opinion were these: at the time these contracts were made, in November, war was still raging in the Crimea, and there was an extraordinary demand for flour for foreign exportation. Negotiations for peace were in progress; but the opinion of the best informed merchants was, that there would not be peace that winter, and that flour would keep up to war prices. Though, in the latter part of December, 1855, when the demand for the margin was made in this case, flour was somewhat lower than the price named in the contract in evidence, yet, even then, the general opinion was, that it would go up; and witness believed at that time, and that was also the opinion of many of his friends, that flour, in February, would not be [less] than $12 a barrel. Flour is always a fluctuating article; but at that period the fluctuations frequent, and to considerable amounts—the general opinion about war and peace varying with the arrival of almost every steamer.

The reasonableness of an amount demanded as a margin, in such a condition of things, would depend upon the extent and character of the fluctuations in the market; that witness had been for a long time acquainted with John W. Bell; that up to the time of his disappearance, he maintained a respectable credit and reputation in Baltimore; that witness also knew the plaintiff; that he was a

miller, resided in New York, and was not a man of credit or reputation; that witness believed that such was the general opinion about flour at the time the margin was demanded in this case, that the plaintiff could not have got $5,000 to put up at the time on the contract; that witness met the plaintiff in Baltimore about Christmas, 1855, at his own request, and conversed with him freely about this particular case, and about Bell's matters generally.

Cross-examination.

On cross-examination, this witness stated that he did not know that there was a general usage in Baltimore by which either party was entitled to demand of the other, on contracts for the future delivery of flour, that a margin should be put up; that witness, according to the usage of his business, would rescind such a contract if, in his judgment, the party did not put up a margin sufficient to protect him; that the reasonableness of the amount of the margin must depend upon speculative ideas of the future value of flour; that the contracts with both Guest & Gilmor and P. Malcolm & Co., had been cancelled, by consent, after a margin had been refused. The same witness stated that, in his judgment, $10,000 would have been a reasonable margin to be demanded in this case, and that $20,000 would not.

Evidence of Levin E. Ballard for defend'ts.

The defendants further proved, by Levin E. Ballard, that he was and had been since 1849, a flour broker in Baltimore city; that from the nature of his employment, he had a large experience in the matter of contracts for the future delivery of flour, or time contracts, as they were called, having been frequently called on by various merchants to buy or sell for them under such contracts; and he considered it to be a clearly understood right of both parties to such contracts to demand a margin in a reasonable amount, to be put up when either party was likely to be unable to perform his engagement; that he entertained this belief from conversations with various merchants on the subject, and did not know of any case where the demand when made had been objected to; that he knew of instances in which the right had been exercised; that he recollected but one instance where, when the margin was demanded, it was put up, and that was a case between Mr. Wysham and Mr. Danner, which was a margin of 25 cents per barrel on 500 barrels of flour; that there was in that case no agreement beforehand about a margin; that he recollected the case of Guest & Gilmor, spoken of by Mr. Fowler, and that in that case the margin was demanded, not put up, and the contract rescinded.

That the same right was exercised and admitted in a case between Guest & Gilmor and John W. Bell, and under these circumstances: that Guest & Gilmor had employed the witness, as broker,

to buy for them, on time, about 20.000 barrels of flour, and that he did so, buying from John W. Bell 10,000 barrels, deliverable in December, January, and February, the contract being made in November, 1855; that he made the customary broker's note in writing of the purchase, and reported it to Guest & Gilmor, who made no objection to the purchase, though they did not sign the written contract tendered by Mr. Bell, saying that they had made the contract for a New York house, and that they wanted to confer with or see them on the subject. This was on the 7th November, 1855. Some time afterwards Guest & Gilmor stated to witness that they would not take Mr. Bell for the contract unless he would put up a margin to secure it, and desired him to inform Mr. Bell of this demand. Witness did so, and Mr. Bell replied that he was perfectly willing to put up the margin, and was very glad that they had called on him to do so, because he had made up his mind, under the circumstances, to make a demand for a margin upon them. Mr. Guest then went to New York to see his principals on the subject, and shortly afterwards, while Mr. Guest was in New York, Mr. Gilmor employed and authorized witness to sell and dispose of the contract they had made with Mr. Bell, provided witness could do so without any loss to them. This was on the 23 November, 1855. Witness, on the same day, met Mr. Lurman, of the firm of Oelricks & Lurman, the defendants, on 'Change, and offered him the contract. At the time the same had been originally made by witness with Bell, the latter had prepared duplicates of a written contract, both to be signed by witness as broker, and the one to be signed "approved" by Bell, and delivered to Guest & Gilmor, and the other to be signed in the same way by Guest & Gilmor, and delivered to Bell. These papers, so prepared by Bell, were handed to witness, and in every particular they corresponded with the written contract given in evidence in this case by the plaintiff, with the single exception that the words "Guest & Gilmor," in the body of the contract, stood in place of the words "Oelricks & Lurman" in the contract now in evidence. The witness having one of these papers in his possession, showed it to Mr. Lurman as containing the terms of the contract which he was employed by Guest & Gilmor to dispose of, and stated to him, at the same time, that the contract was subject to the customary right of either party to demand a reasonable margin. Witness also stated to Mr. Lurman that he was under an engagement to offer the contract to Bell himself, in case Messrs. Guest & Gilmor should offer to dispose of it, which was the case—Mr. Bell having some days previous made that request of witness. Mr. Lurman said he would take the contract if Bell did not. Witness then went to Bell's store, and asked him if he wanted the contract. Bell asked two or three hours to determine; but witness replied to him that he must take it at once if he wanted it, inasmuch as he had a purchaser at that time in the defendants, who might change their mind if he did

not at once conclude the bargain with them, the arrival of a steamer from Europe with flour news being momentarily expected. Bell, on this, declining to take the contract, accompanied witness at his request to the Exchange, where they both met Mr. Lurman.

Mr. Lurman said he would take the contract. He said that he made all his contracts with reference to the usage, giving the right to demand a margin. Mr. Bell said he did the same, and it did not matter that the usage was not stated in the contract. Lurman told witness to copy this contract. Witness asked Lurman if he, witness, should insert about the margin in the contract. Lurman said no; he was satisfied with Mr. Bell. Mr. Bell said he would rather not have the contract altered, as the party he was selling for was out of town; that the margin was understood. Witness went to his counting-room and wrote two copies of the contract, and took one to Mr. Lurman, which Mr. Lurman signed at his counting-room, which is the one offered in evidence; one copy witness left with Mr. Lurman, and the other with Mr. Bell. Witness, being recalled, stated that the objection stated which Bell made to an alteration in the contract, was as to inserting the name of Oelricks & Lurman instead of that of Guest & Gilmor.

Witness heard no more of the matter until about the 19th or 20th December, when it was rumored that Bell had failed, and was not to be found at his place of business. No one knew where he was. On the 21st December, the defendants directed witness, as their broker, to demand a margin of $5,000 to be put up to secure the contract of which he had spoken; and accordingly, that witness wrote a note, (which was here produced,) which he left, on the morning of that day, before 12 o'clock, with Mr. Turnbull, the chief clerk of Bell, at the latter's place of business; which note was as follows:

Note from L. E. Ballard to J. W. Bell.

BALTIMORE, *Dec.* 21, 1855.

Mr. J. W. BELL.

DEAR SIR: This is to notify you that Messrs. Oelrick & Lurman, the parties for whom I purchased the 10,000 barrels of flour for future delivery on the 7th November past, at $9.25 per barrel, demand that the sum of $5,000, margin as per contract, be deposited in the Merchants' Bank of Baltimore by you on Saturday, the 22d inst., when the same sum will be deposited at the same place by them, otherwise the contract will be considered cancelled.

Truly yours,

L. E. BALLARD, *Broker.*

That on the 24th day of December, witness called again at the store of Bell to know whether the margin would be put up, and saw Mr. Turnbull, and learning from him that it would not be put up,

he wrote another note, (which was here produced,) and delivered the same to Mr. Turnbull at Bell's store; which note reads as follows:

Note from Levin E. Ballard to John W Bell.

BALTIMORE, *December* 24, 1855.

JOHN W. BELL, Esq.

DEAR SIR: The sum of $5,000, as demanded by the purchaser of 10,000 barrels of flour, *you*, on the 7th November past for future delivery, had not been placed in the Merchants' Bank by you up to the time specified in my note (to you) of the 21st instant; and as the purchasers were ready with a similar amount to deposit, you have failed to comply with the contract, and I have cancelled the same, in consequence of said failure on your part to comply.

Yrs., &c.,

L. E. BALLARD.

That witness *thereup* addressed and delivered at the store of the defendants the following note:

Note from L. E. Ballard to Oelricks & Lurman.

BALTIMORE, *December* 24, 1855.

Messrs. OELRICK & LURMAN.

GENT'N: The demand I made (in my note of the 21st, left at the office of John W. Bell) for the deposit of the sum of $5,000 as margin in the contract for flour for future delivery, sold by John W. Bell to you 7th Nov. past, has not been complied with; and I have this day notified him, that in consequence of this failure to comply on his part, the contract is cancelled.

Truly yrs.,

L. E. BALLARD.

The defendants further proved by this witness, that up to the time of his disappearance, John W. Bell enjoyed good credit and reputation as a merchant in the city of Baltimore; that the plaintiff was not, at the time of the transaction given in evidence, of good credit and reputation; that the flour was bought by the defendants for foreign shipment, and that after the cancelling of this contract, they bought other flour to replace it, and shipped it; that at the time of the demand for a margin in this case, flour was lower than the contract price; but it was the general opinion that there would not be peace that winter, and witness and most well-informed merchants believed that flour would go up as high as $12 a barrel in February; that he considered the demand for a margin, as made by the defendants, to be reasonable; that flour was at this time a very fluctuating article; and witness had known it to vary from $2 to $3 a barrel in 48 hours.

Cross-examination.

On cross-examination, this witness stated that, according to his judgment, any amount would be a reasonable margin to demand, which did not exceed between the intrinsic value of flour and its speculative value; that by intrinsic value, he means the cost of its production, which could easily be ascertained on any given day; and by speculative value, the price at which it was rating above its intrinsic value. On being asked whether it was, in his opinion, reasonable to demand a margin, when flour was rating lower than the contract price, he answered that he considered it reasonable in this case, because he believed that it was going up to $12 a barrel, and that if it had done so, the plaintiff would never have been heard of.

On cross-examination, this witness stated that the amount to be demanded by way of margin was not a fixed amount, but one dependent on the necessities of the case; that it was not dependent on the market price of the article, but upon the solvency or insolvency of the parties; that the usage, so far as he knew, did not fix any particular period of notice to be given of a demand for a margin.

Re-examination in chief, and also of Mr. Fowler.

The defendants further proved by this witness, and also by Mr. Fowler, a former witness, that during the months of January and February of the year 1856, there was very little flour in the Baltimore market of the description mentioned in the contract in evidence, not more than was necessary for domestic use; that the supply had been cut off by the freezing of the western rivers, and the stoppage of the Baltimore and Ohio railroad; and that a demand for 10,000 barrels of such flour over and above what was in market would have considerably raised its price.

Evidence of Mr. Hopkins, witness for defend'ts.

They then proved, by Mr. Hopkins, that he was, in December, 1855, a flour merchant in Baltimore, and a creditor of John W. Bell; that [at] the time of Mr. Bell's disappearance, being anxious about his claim, he made himself fully acquainted with the condition of his affairs from his books and papers, and *and* was cognizant of everything touching them, including the transaction with the defendants, and their demand for a margin, up to the evening of the 24th inst., when he left Baltimore by the night train for New York, in order to secure his claim, if possible, by attachment; that he must have known of the demand for a margin, although he did not now specially recollect it; that he arrived in New York on the morning of the 22d, and, after settling his business, saw the plaintiff, with whom he was intimate, and communicated to him fully all he knew about Bell's affairs; that he could not say certainly

whether any conversation took place about Bell on the 22d, but that on the 24th he had a full conversation with the plaintiff, who agreed to come on to Baltimore with witness; and they started in the evening of that day, and arrived in Baltimore early on the 25th, Christmas day. That witness believed the contract with the defendants to be a good contract, and advised the plaintiff to put up the margin as demanded; and he said he would do so if it were necessary, but he did not consider it necessary. That on Christmas morning, after their arrival, they went to the office of Messrs. Brown & Brune, attorneys, with whom all the books and papers of Bell had been then deposited as his standing counsellors, and there saw the notes from Ballard, given in evidence, and the other books and papers of Bell; that the plaintiff consulted with Messrs. Brown & Brune, as his attorneys, as to the propriety or necessity of his putting up the margin as demanded. He said he would put it up if it was necessary, but that he did not consider it necessary, as there was no stipulation in reference to it in the written *written* contract. The plaintiff left Baltimore on Christmas evening.

Evidence of Wm. F. Frick, for defendants.

The defendants further proved, by Wm. F. Frick, that on the 29th December, about 12 o'clock, Mr. Brown, of the firm of Brown & Brune, attorneys, called at his office with a person whom he introduced as Mr. Ford, a son of the plaintiff, and stated that the latter intended to comply with his contract for the delivery of flour in January and February to the defendants, and that the notice was given to witness as their attorney. The contracts shown were that of November 7th, made by Ballard, and one of October 31, in Bell's name, in the latter of which Ford claimed also to be the principal. That witness replied that the defendants had, during the preceding week, given notice to J. W. Bell, whom alone they knew in the matter, that unless he put up a certain margin, all the contracts would be rescinded; and that by the failure of Mr. Bell to comply with the demand, the defendants considered the contracts vacated. That witness then further stated that he and the defendants were aware that the plaintiff had been in Baltimore on Christmas day, and that they had heard nothing from him until the present time; and that if he had intended complying with the contract, he should have acted upon the notice which had been given to his agent, Mr. Bell. That Mr. Brown said that the simple object of his visit was to give notice that the plaintiff would comply with his contract to deliver the flour; and that witness then repeated that the defendants (as Mr. Brown was aware) had notified Mr. Bell that the contracts were cancelled by reason of his non-compliance with the demand for security, and that they should continue so to regard the matter.

Evidence of Mr. Hinks, for defendants.

The defendants then proved, by Mr. Hinks, a flour merchant,

that on the 31st December, 1855, he sold to the defendants 6,000 barrels of the same kind of flour mentioned in the contract given in evidence, deliverable in the ensuing January and February, to be paid for on delivery, at $8 75 per barrel.

Cross-examination.

On cross-examination this witness stated that he had been 20 years in the flour trade; that he knew of no usage by which one party was entitled to demand a margin of the other on time sales of flour; that in the sale to the defendants of the 6,000 barrels of flour no margin was demanded; that the defendants were large purchasers of flour; that in the month of November, 1855, as he supposed, they must have bought at least 100,000 barrels of flour; that witness had often sold them flour, and that a margin had never been required of him.

Plaintiff's rebutting proof.

The plaintiff then, by way of rebutting proof, proved by Messrs. Campbell, Vickers, Pleasants, Grafton, Meixsell, Spence, Sauerwein, and Hopkins, that they were each of them flour merchants, or engaged in buying and selling flour, for many years in Baltimore city, and that they knew of no usage whereby the parties to flour contracts on time were entitled to demand a margin to be put up to secure a faithful performance on the same. Mr. Pleasants said he would laugh at any one who would make such a demand of him.

On cross-examination, Mr. Vickers stated that he had not much to do with making time contracts; and that a certain class of flour dealers were more accustomed than others to deal in that sort of contracts. Mr. Sauerwein also stated that he was not accustomed to make time contracts. Mr. Pleasants stated that he had not dealt in flour at all since 1853.

Deposition of Duncan W. Turnbull, for plaintiff.

The plaintiff then further offered in evidence the following deposition of Duncan W. Turnbull, of Minnesota, taken by consent under a waiver of the form of a commission. The letter A, referred to by this witness, is Ballard's note of Dec. 21st to Bell, and letter B, Ballard's note of Dec'r 24 to Bell.

Answers to interrogatories contained in paper signed by Brown & Brune, of Baltimore, Md.

Answer to interrogatory No. 1. J. W. Bell absented himself on or about the 19th day of December, 1855. He suddenly disappeared from the city of Baltimore, without leaving sufficient means to pay his debts. He did not give any one the power to attend to or manage his business. He has never returned to the city of Baltimore, to my knowledge. He did not give me any instructions concerning his business.

Answer to interrogatory No. 2. Mr. Ford never gave me the authority to inform Mr. Ballard that he would not put up a margin. I saw Mr. Ford first, after Bell's disappearance, on the morning of the 25th of December, 1855. He called at the house where I was then living, and requested me to go with him to Brown & Brune's office; he wanted to look at Bell's books and papers. Mr. Ford was at that time a resident of New York, doing business in that place. Mr. Ford was not in Baltimore, to my knowledge, until the morning of the 25th December, 1855.

Answer to interrogatory No. 3. I did not inform Mr. Ford, either by letter or telegraph, concerning the letter marked A. I telegraphed to Mr. Ford, at Winchester, Va. I do not remember the exact words. The substance of the despatch was, "Has Bell arrived in Winchester?" The despatch was answered by J. H. Ford. He stated that he had not seen Bell, or something to that effect.

Answer to interrogatory No. 5. I cannot produce the despatches; I did not preserve them; I had no authority from Mr. Ford by either word or letter or telegraph to inform Mr. Ballard that he would not put up a margin.

DUNCAN M. TURNBULL.

TERRITORY OF MINNESOTA,
County of Ramsey, ss:

On this 27th day of March, 1855, personally appeared before me, N. Gibbs, a justice of the peace in and for the county of Ramsey, and Territory of Minnesota, Duncan M. Turnbull, and being duly sworn, deposes, answers are true to his own knowledge.

N. GIBBS,
Justice of the Peace.

Answers to interrogatories contained in paper forwarded by Wm F. Frick, of Baltimore, Md.

Answer to interrogatory No. 1. I was acquainted with John W. Bell; he is related to me by marriage; he is a brother-in-law.

Answer to interrogatory No. 2. I was employed by J. W. Bell in the month of December, 1855, in the capacity of clerk.

Answer to interrogatory No. 3. A letter, of which the one marked A is a copy, was left at the counting-room occupied by Mr. Bell, and there received by me. I do not remember the exact date; I think it was left on the 22d December, 1855.

Answer to interrogatory No. 4. I have no knowledge of Mr. Ford's declining to put up a margin.

Answer to interrogatory No. 5. I did not inform Mr. Ford of the contents or substance of the letter marked A.

Answer to interrogatory No. 6. I neither received nor forwarded

to Mr. Ford any letter or telegraph despatchic concerning the contract or letter marked A.

Answer to interrogatory No. 7. I did not inform Mr. Ballard that I had heard from Mr. Ford, and that he declined to put up a margin. I had some conversation with Mr. Ballard, but I do not recollect what it was.

Answer to interrogatory No. 8. A letter, of which the one marked B is a copy, was left at the counting-room occupied by J. W. Bell, and there received by me; it was left on the 24th day of December, 1855.

DUNCAN M. TURNBULL.

TERRITORY OF MINNESOTA,
County of Ramsey, ss:

On this 27th day of March, 1857, personally appeared Duncan M. Turnbull, and being duly sworn, deposes and says the above answers are true.

N. GIBBS,
Justice of the Peace.

Evidence of Mr. Manro for plaintiff.

The plaintiff then further proved, by Mr. Manro, that he was the junior clerk of Bell, and had been so for two years before the latter disappeared; that when Bell went away he left no authority to any one, so far as witness knew, to represent him; that witness was in the counting-room when both of the notices of Mr. Ballard were presented, and that he gave no notice of them to the plaintiff, nor did any one else, to his knowledge; that he first saw the plaintiff after Bell's disappearance on Christmas day; that the effects of Bell had been seized by the sheriff under attachments, and the books and papers had been sent to Messrs. Brown & Brune, as his attorneys; that he was well acquainted with Bell's business for two years, and never knew him in any case either to put up a margin or demand one; that witness is now a clerk of P. Sauerwein & Co., and they are engaged in the flour business, and that witness knows of no usage by which a party in a flour contract for future delivery has a right to demand a margin.

Cross-examination.

On cross-examination, this witness stated that after Bell's disappearance they kept the store open, and continued to do some business, as receiving money and making deposits; that Bell operated generally for the plaintiff; that the plaintiff was a large dealer in flour, and had no other agent here than Bell, who bought and sold flour for him.

Defendants' rebutting proof.

The defendants then, by way of rebutting proof, proved by L. E. Ballard that at the time he delivered the two notes at Bell's count-

ing-room, (which are in evidence,) the store and counting-room were open, and they were apparently engaged in transacting business as usual; that Turnbull was there attending to the business generally, paying of draymen, settling accounts, and such matters; that when he delivered the first note to Turnbull, he said he would telegraph to the plaintiff, and on the 24th he called again to know whether they intended putting up the margin, as he had been instructed by Mr. Lurman that he would be satisfied if it was put up at any time within a week; and that he distinctly recollected that on asking Turnbull whether the margin was to be put up, his reply was, that he had heard from the plaintiff, and that he (the plaintiff) would not put up the margin, because it was not mentioned in the contract; and that witness thereupon wrote the note of the 24th December, cancelling the contract. All the foregoing testimony on the part of the defendants was taken subject to exception, and the testimony on both sides being closed, the plaintiff then prayed the court to instruct the jury:

Plaintiff's Prayer.

1. That the evidence in this case is insufficient to authorize the jury to find that there is an usage in the city of Baltimore, with regard to contracts for the sale of merchandise to be delivered at a future time, by which the defendants were authorized to annul the contract bearing date the 7th November, 1855, given in evidence, upon the failure of the plaintiff to put up a margin in money, as security for its performance, in compliance with the demand contained in the letter of the witness, Ballard, to J. W. Bell, of the 21st December, given in evidence.

2. That such an usage, if found by them to exist, is invalid, and not binding, because it is unreasonable.

3. That evidence of such an usage, if it should be established by competent evidence, and be held reasonable by the court, is inadmissible in this case, because it contradicts or waives the written contract dated the 7th November, 1855, given in evidence.

4. That if the jury find that before the 21st day of December, 1855, J. W. Bell had left the city of Baltimore without authorizing any person to represent him in his absence, and have never since returned, the letters of the witness, Ballard, of the 21st and 24th December, 1855, left at the former place of business of said Bell, as proved by the said Ballard, did not affect the plaintiff with notice of the demand for a margin mentioned in said letters, even if, under any usage or contract, the defendants were authorized to make such demand.

5. That if the jury find that the witness, Ballard, reduced the said contract dated the 7th November, and given in evidence, to writing, at the request of the defendant, Lurman, and that said Ballard signed two copies of the same, and procured the approval

of the defendants, and of Bell, as agent of the plaintiff to the same, by their signatures thereto, and delivered one of the said contracts to the defendants, and the other, which has been given in evidence by the plaintiff, to said Bell, and shall further find all this was done on the 23d November, 1855, after the interview at the Exchange between the defendant Lurman, and the said Bell, spoken of by the witness Ballard; and shall also find that, at said interview, the defendant, Lurman, declined to have the clause inserted in said contract having reference to putting up a margin; and if the jury find that said Bell, upon the 12th and 15th December, delivered 2,000 barrels of flour under said contract which were received by the defendants, and paid for by them; and if the jury shall further find that the plaintiff offered to deliver, and was prepared and willing to deliver, the balance of the 8,000 barrels contracted to be delivered under said contract at the times and in the prices testified to by the witnesses of the plaintiff, and that the defendants refused to receive the same, then the plaintiff is entitled to recover in this suit the difference between the price of flour mentioned in said contract ($9 25) and the market value of the parcels of flour tendered by the plaintiff on the days on which they were respectively tendered, with interest thereon from such periods, respectively. But the court rejected the prayers of the plaintiff, and each of them, and in lieu of them, granted the following instructions to the jury:

Court's instructions.

1. If the jury shall find from the evidence in this case that the defendants entered into the written contract dated the 7th of November, 1855, which has been offered in evidence, and that the plaintiff offered to deliver to the defendants in the months of January and February, 1856, eight thousand barrels of flour in pursuance of the stipulations of said contract, and in the mode therein pointed out; and that, when said offers were made by the said plaintiff, he had the requisite amount of flour to comply in good faith with said offers, and could have delivered the same if the defendants had been willing to receive the same, and shall further find that the defendants wholly refused to receive and pay for said flour according to the terms of said contract, then the plaintiff is entitled to recover such damages as the jury may find from the evidence he has suffered from said refusal of defendants to execute the said contract on their part.

2. The rule of damages in this case is the difference between the contract price of the flour and the market value in the city of Baltimore of the same on the several days on which the plaintiff offered to deliver the same in accordance with the provisions of said contract, with interest on such sum in the discretion of the jury. To the granting of which instructions the defendants prayed leave to

except, and that the court would sign and seal this their bill of exceptions, which is accordingly done, this 21st day of November, 1857.

WILLIAM F. GILES, [SEAL.]

And now here, at this day, to wit, the 21st day of November, A. D. 1857, the said Henry Oelricks and Gustave W. Lurman produced to the said circuit court here the writ of the said United States of America, for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December next, which said writ of error is in the words and of the tenor following, to wit:

THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the judges of the circuit court of the United States for the fourth circuit in and for the Maryland district, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you or some of you, between Benjamin Ford, plaintiff, and Henry Oelricks and Gustav. W. Lurman, defendants, a manifest error hath happened to the great damage of the said Henry Oelricks and Gustav. W. Lurman, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable R. B. Taney, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and fifty-six.

W. F. F. & J. N., issued 21st Nov., 1857.

THO. SPICER, *Clk. Circt. Ct.*

In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid so as afore-

said rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

UNITED STATES OF AMERICA, *ss:*

To Benjamin Ford, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Maryland, wherein Henry Oelricks and Gustav. W. Lurman are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal, at the city of Baltimore, in the district aforesaid, this twenty-first day of November, A. D. 1857.

WILLIAM F. GILES, [SEAL.]

Notice of the above citation acknowledged 21st day of November, 1857.

BROWN & BRUNE.

Writ of Error bond.

Know all men by these presents, that we, Henry Oelricks, Gustav. W. Lurman, and H. F. Huntermiller are held and firmly bound unto Benjamin Ford in the just and full sum of twenty-four thousand five hundred dollars, lawful money of the United States, to be paid to the said Benjamin Ford, his heirs, executors, administrators, or assigns, to which payment well and truly to be made and done we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twenty-first day of November, in the year of our Lord one thousand eight hundred and fifty-seven.

Whereas, at a circuit court of the United States for the fourth circuit in and for the Maryland district, begun and held at the city of Baltimore on the first Monday in November, in the year of our Lord one thousand eight hundred and fifty-seven, Benjamin Ford, a citizen of the State of New York, by the judgment of the same court, recovered against Henry Oelricks and Gustav. W. Lurman, citizens of the State of Maryland, as well the sum of twelve thousand one hundred and sixty-nine dollars for his damages, as also his costs and charges by him about his suit in that behalf laid out and expended:

And whereas the said Henry Oelricks and Gustav. W. Lurman have sued out the writ of the United [States] of America for the